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September 3, 2014

## PSC STAFF OPINION 2014-011

Brendon D. Miller, Esquire  
Office of the Breathitt County Attorney  
1149 Main Street  
Jackson, Kentucky 41339

Re: Breathitt County Water District  
Frozen Creek Waterline Extension Phase III

Dear Mr. Miller:

Commission Staff acknowledges receipt of your letter of August 11, 2014, in which you request on behalf of the Breathitt County Water District ("BCWD") an Opinion regarding the need for a Certificate of Public Convenience and Necessity for a water line extension in Breathitt County, Kentucky. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

Based upon your letter, Commission Staff understands the facts as follows:

Breathitt County Water District, a water district organized pursuant to KRS Chapter 74, provides water service to 1,459 customers in Breathitt County, Kentucky.<sup>1</sup> On October 30, 2012, Breathitt County Water District filled an Application for "Frozen Creek Phase I Project." Said Project was to consist of the construction and installation of approximately 57,800 linear feet of 8-inch PVC waterline; 4,060 linear feet of 4-inch PVC waterline; 760 linear feet of 2-inch PVC waterline; various sized HDPE directionally drilled waterline; a duplex pump station; a 132,000 gallon water storage tank, and all appurtenances.

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<sup>1</sup> *Annual Report of Breathitt County Water District to the Public Service Commission for the Year Ended December 31, 2013 ("Annual Report")* at 53 of 71.

The project was to be totally funded through a Grant Agreement titled "Federally Funded Memorandum of Agreement Between the Commonwealth of Kentucky Environmental and Public Protection Cabinet and Breathitt County Water District" administered by the Kentucky Division of Abandoned Mine Lands (AML).<sup>2</sup> Said Application was granted pursuant to Order entered January 17, 2013 in Case No. 2012-00481.<sup>3</sup> Breathitt County Water District subsequently proposed to construct Phase II of the Frozen Creek Waterline Extension Project to an area where residents currently rely on wells, springs, and hauled water for their domestic needs. That project was expected to cost approximately \$2,040,062.00, and which was to be totally paid for with Federal Abandoned Mine Lands funds. The project would not create wasteful duplication of plant, equipment, property or facilities, and would not conflict with existing operations of utilities in the same area. The project would not materially affect the existing financial condition of the utility and would not result in increased charges to its customers.<sup>4</sup> Said proposed project was approved for implementation without the need for a Certificate of Public Convenience and Necessity by PSC Staff Opinion 14-007, issued May 16, 2014. Breathitt County Water District now proposes to construct Phase III of the Frozen Creek Waterline Extension Project to a similar area where residents currently rely on wells, springs or hauled water for their domestic needs. The Phase III project will cost approximately \$799,666.45, to be totally paid for with Federal Abandoned Mine Lands funds. The project will not create wasteful duplication of plant, equipment, property or facilities, and will not conflict with existing operations of utilities in the same area. The project will not materially affect the existing financial condition of the utility and will not result in increased charges to its customers.<sup>5</sup>

Your letter presents the following question: Is Breathitt County Water District required to obtain a Certificate of Public Convenience and Necessity for the proposed Phase III project?

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<sup>2</sup> The Application of the Breathitt County Water District of Breathitt County, Kentucky, for a Certificate of Public Convenience and Necessity to Construct and Finance, Pursuant to KRS 278.020, p. 1, paragraphs 4 and 5, Case No. 2012-00481.

<sup>3</sup> Case No. 2012-00481, Order entered Jan. 17, 2013.

<sup>4</sup> Letter of March 21, 2014 from Hon. Brendon D. Miller, Breathitt County Attorney, on behalf of the Breathitt County Water District.

<sup>5</sup> Letter of August 11, 2014 from Hon. Brendon D. Miller, Breathitt County Attorney, on behalf of the Breathitt County Water District.

KRS 278.020(1) provides:

No person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010, except retail electric suppliers for service connections to electric-consuming facilities located within its certified territory and ordinary extensions of existing systems in the usual course of business, until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction.

Administrative Regulation 807 K 5:001, Section 15(3), further provides:

Extensions in the ordinary course of business. A certificate of public convenience and necessity shall not be required for extensions that do not create wasteful duplication of plant, equipment, property, or facilities, or conflict with the existing certificates or service of other utilities operating in the same area and under the jurisdiction of the commission that are in the general or contiguous area in which the utility renders service, and that do not involve sufficient capital outlay to materially affect the existing financial condition of the utility involved, or will not result in increased charges to its customers.

Under the method of analysis that Commission Staff has historically employed, the construction of the water distribution mains described herein appears to be in the ordinary course of business and does not require a certificate of public convenience and necessity. According to its Annual Report, Breathitt County Water District currently has total utility plant of \$35,906,695.<sup>6</sup> The proposed change represents an increase in Breathitt County Water District's total utility plant of 2.2%. Such increase in total utility can be considered as ordinary. *See, e.g., City of Covington v. Board of Commissioners of Kenton County Water District No. 1*, 371 S.W.2d 20 (Ky. 1963).

Recent legislative action, furthermore, specifically exempts the proposed construction from the requirement for a Certificate of Public Convenience and Necessity. In the 2012 Extraordinary Session, the Kentucky General Assembly enacted legislation that provides:

Water Districts and Water Associations: A water district created pursuant to KRS Chapter 273 that undertakes a waterline extension or improvement project shall not be required to obtain a certificate of

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<sup>6</sup> 2013 Annual Report, p. 20 of 71.



public convenience and necessity, notwithstanding KRS 278.020(1), if the water district or water association is a Class A or B utility as defined in the Uniform System of Accounts established by the Public Service Commission, pursuant to KRS 278.220, as the system of accounts prescribed for utilities in Kentucky, and either: (a) The water line extension or improvement project will not cost in excess of \$500,000; or (b) The water district or water association will not, as a result of the water line extension or improvement project, incur obligations requiring Public Service Commission approval pursuant to KRS 278.300. In either case, the water district or water association shall not, as a result of the water line extension or improvement project, increase rates to its customers.

2012 Ky. Acts Ch. 144. This Act became effective on July 1, 2012.

Although the construction costs in this matter are in excess of \$500,000, the projected total of \$799,666.45 will be paid in full by Federal Abandoned Mine Lands funds, and hence will not require Breathitt County Water District to incur obligations requiring Commission approval pursuant to KRS 278.300. Therefore, the Act exempts the construction from the requirement to obtain a Certificate of Public Convenience and Necessity. As Breathitt County Water District had annual water operating revenues in calendar year 2013 of \$688,260,<sup>7</sup> and as it had average annual revenues of \$560,025 for the past three calendar years, it is a Class B water utility<sup>8</sup> and falls within the class of water utilities subject to the exemption.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Jim Wood, Staff Attorney, at (502)782-2589.

Sincerely,



Jeff Derouen  
Executive Director

JW/kg

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<sup>7</sup> 2013 Annual Report, p. 53 of 71.

<sup>8</sup> The Kentucky Public Service Commission's Uniform System of Accounts defines a Class B water utility as a utility "having annual water operating revenues of \$250,000 or more but less than \$750,000." *Uniform System of Accounts for Class A and B Water Districts and Associations* at 14 (2002) (found at <http://psc.ky.gov/agencies/psc/forms/usoa/0700ab02.pdf>).